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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THOMAS COOK et al., Plaintiffs and Respondents, v. GERALD POCAN, Defendant and Appellant.	H040945 (Santa Clara County Super. Ct. No. CV082917)

I. INTRODUCTION

Appellant Gerald (Jerry) Pocan was the real estate agent who represented the sellers, Arroyo Bayo Partnership, in the 1991 sale of 160 acres of rural property in Santa Clara County to respondents Sharonrose Cannistraci and Thomas Cook (hereafter collectively plaintiffs). Pocan was also a partner in the Arroyo Bayo Partnership.

The purchase agreement for the 160 acres, known as Parcel 11, included an easement over Parcel 11 to allow access to adjacent landlocked property. During escrow, plaintiffs and Pocan agreed that Pocan would draft an easement that described the location of the easement as agreed upon by plaintiffs, which was away from the secluded pond and other scenic features of Parcel 11. Pocan did not tell plaintiffs that he was in the process of withdrawing from the Arroyo Bayo Partnership and negotiating his acquisition of the adjacent landlocked property, Parcels 5 and 6.

Parcels 5 and 6 were eventually sold to Terri Lawrence. In 2004, plaintiffs discovered that Robert Balcom, a bulldozer operator retained by Lawrence to grade an access road on the easement over plaintiffs' property, had graded a road next to the secluded pond and had damaged some of the property's scenic features. In 2007, plaintiffs filed the instant action against Pocan, Lawrence, and other defendants who are not parties to this appeal.

The matter proceeded to a court trial on the causes of action against Pocan for negligent misrepresentation and breach of contract. The trial court found that Pocan was liable for negligent misrepresentation regarding the easement on plaintiffs' property, but no tort damages were awarded because the award was completely offset by the amount of plaintiffs' settlement with Balcom. The court awarded contract damages against Pocan in the amount of $920 for prelitigation surveying costs incurred by plaintiffs in an effort to resolve the issue of the easement's location. An amended judgment in plaintiffs' favor in the amount of $920, plus costs, was entered on February 21, 2014.

On appeal, Pocan contends that the judgment should be reversed because the trial court erred with regard to several of the court's rulings with respect to liability and damages for negligent misrepresentation and breach of contract. For the reasons stated below, we find no merit in Pocan's contentions and we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

Plaintiffs filed a verified compliant on March 29, 2007, against Lawrence, Scott Kozer, Balcom, Pocan, and Arroyo Bayo Partnership. Only Pocan is a party to this appeal.

The allegations in the complaint include the following. In 1991, plaintiffs purchased 160 acres that included "mountains, valleys, ponds and a creek" from the seller, Arroyo Bayo Partnership. Pocan acted as the real estate agent for the Arroyo Bayo Partnership. He threatened that escrow would not close unless plaintiffs granted an

easement across their property for ingress and egress to benefit property then owned by Pocan.

Plaintiffs agreed that an easement could be located on their property far away from their "swimming hole and ancient oak tree, [and] invisible from the pond on the eastern portion" of their property. Plaintiffs relied on Pocan's representation that the deed and easement would be drafted to reflect the location agreed to by plaintiffs, and purchased the property after signing the deeded easement.

Plaintiffs' wedding took place on their 160-acre property in 1992, and between 1992 and 1994 they built a home there. Plaintiffs and their family enjoyed exclusive use of the property until April 4, 2004, when "defendants Lawrence, Kozer, [and] Balcom . . . bulldozed, graded, and cut an illegal road on top of and adjacent to plaintiffs' pond on the north eastern side of plaintiffs' property to defendant's property, upon, across and through private scenic parts of plaintiffs' property that were previously inaccessible except on foot." Defendants' actions in creating and using the illegal road damaged the natural environment and contours of plaintiffs' land, spring, ponds, earthen dam, and rock spillway, and continue to cause damage.

The causes of action asserted against defendant Pocan include: (1) negligence (failure to prepare an accurate easement in accordance with plaintiffs' agreement and notify prospective buyers of defendant's property of the location of the easement); (2) declaratory relief (as to the location of the easement and the rights of the parties); (3) reformation or rescission of the deed and description of the easement; and (4) breach of contract (oral agreement to prepare a deed and description of the easement that accurately reflected plaintiffs' agreement as to its location).

In his verified answer to the second amended complaint,[1] Pocan admitted that he was a licensed real estate agent and he had prepared an easement that concerned the

[1] The second amended complaint was not included in the record on appeal.

subject properties. Pocan also admitted "there is a written agreement concerning the easement." Among other affirmative defenses, Pocan asserted that the causes of action were "barred by the applicable statutes of limitations as set forth in section 337 *et seq.* of the Code of Civil Procedure."

B. *Court Trial*

The matter proceeded to a bifurcated court trial that was held in two phases, liability and damages. We provide a brief summary of the trial testimony and the documentary evidence submitted in each phase, as well as the trial issues determined by the court.

1. Liability Phase

Trial Issues

The trial court determined that there were four controverted liability issues: (1) "Whether defendant, Jerry Pocan, breached the contract he made with the plaintiffs concerning the location and description of the easement in question;" (2) "Whether the Ninth Cause of Action for breach of contract is barred by the statute of limitations;" (3) "Whether defendant Pocan negligently misrepresented an important fact (i.e., that he would have an easement document that correctly and clearly described the easement prepared and recorded);" and (4) "Whether the plaintiffs' claim for negligence or negligent misrepresentation is barred by the statute of limitations pursuant to California Code of Civil Procedure § 338." (Italics omitted.)

Plaintiffs Purchase Parcel 11 with an Easement

According to the trial testimony, plaintiffs wanted to buy land in the "back country" that was as "untouched as possible" and had water features and a private road, where their children could experience the natural environment. Cannistraci found an advertisement in the San Jose Mercury News for parcels of Santa Clara County ranch land with water features.

Plaintiffs were interested in buying the advertised property, which they later became aware was designated Parcel 11 of the Arroyo Bayo Ranch, because it met their criteria for a back country property. Pocan was one of a group of investors who had formed a partnership, the Arroyo Bayo Partnership, to buy the Arroyo Bayo Ranch in 1979. He was acting as the real estate agent for the sale of ranch parcels by the Arroyo Bayo Partnership.

Plaintiffs offered to buy Parcel 11, which is 160 acres, on April 28, 1991. They accepted a counteroffer to purchase Parcel 11 from the Arroyo Bayo Partnership on May 25, 1991. The counteroffer presented by Pocan provided plaintiffs with five working days to approve the easements for ingress or egress to landlocked parcels.

On June 7, 1991, Cook met with Pocan at the property. Pocan pulled a gun from his car and slapped it on the car's hood. Pocan had a gun because he always carried a gun in the back country due to the presence of wild boar, skunks, and rattlesnakes.

Cook recalled that during their meeting on June 7, 1991, Pocan insisted for the first time that plaintiffs provide an easement across their property to the landlocked parcel to the north, explaining that otherwise it would be illegal to sell Parcel 11. Pocan told Cook that he wanted the easement to go by the secluded pond on Parcel 11. Cook did not want an easement in the private area by the pond and ultimately agreed that an easement could go "west of that west ridge where we couldn't see it from the pond." Cook understood that Pocan would make sure that the easement was correctly described in accordance with their agreement as to the easement's location.

While the transaction was in escrow, Pocan was in the process of withdrawing from the Arroyo Bayo Partnership and negotiating his acquisition of several ranch parcels. Pocan did not disclose to plaintiffs that he had withdrawn from the partnership before escrow closed and had become the owner of Parcels 4, 5, 6, and 7 on July 11, 1991.

During escrow, plaintiffs received documents from the title company that included a "Road and Utility Easement," which Cook believed placed the easement in the agreed-upon location in order to give access to Parcel 6, the adjacent parcel. Plaintiffs signed the easement on June 21, 1991. On June 25, 1991, or June 26, 1991, the title company contacted Pocan regarding a problem with the easement that needed to be taken care of before escrow could close. Pocan told his attorney to handle it.

Cook spoke with Pocan on June 26, 1991, regarding a wording change to the easement. Pocan did not disclose that he was acquiring Parcels 5 and 6. Cook also spoke with persons from the title company on June 26, 1991. Among other things, Cook was informed that there were problems with the easement and the title company's attorney was looking at it. The next day, the title company requested that Cook come to the title company office and sign a second time. Cook complied and, while he was at the title company office, he signed a blank page on the understanding that the attorney had made some wording changes to the easement. Cannistraci signed the easement in her office, believing that it was just a formality to fix the legal description of the easement.

Pocan participated in drafting the easement that was recorded when the sale of Parcel 11 to plaintiffs was recorded on June 28, 1991. The easement that was recorded on June 28, 1991, was different than the easement that plaintiffs had signed on June 21, 1991. The recorded easement benefited Parcel 5 in addition to Parcel 6 and added a 100-foot corridor. Also, the recorded easement had a plat map entitled Exhibit C attached to it that depicted the location of the easement, instead of Exhibit D, the plat map attached to the original signed easement. Pocan did not tell plaintiffs that there were changes in the easement that was actually recorded.

Doyle Slack was one of a group who bought Parcels 5 and 6, the two parcels to the north that were adjacent to Parcel 11, from Pocan in 1992. Slack walked the property with Pocan, who told him that the owners of Parcel 11 did not want their pond to be damaged by a road. Slack spoke with Cook sometime in 1992 regarding Slack's plan to

put a road to his property on the easement over Parcel 11 that would go by plaintiffs' secluded pond. Cook refused because that was not the location of the easement to which plaintiffs had agreed. Cook told Slack to "[g]o back and talk to Mr. Pocan because he knows what we agreed to." According to Slack's testimony, he came up with a different road proposal with a route that would not involve the pond or touch Parcel 11. Slack recalled that a road was graded under that proposal that allowed access to Parcels 5 and 6.

Grading on Parcel 11 in 2004

Lawrence bought Parcels 5 and 6 from Slack in 2004. Lawrence hired Balcom, a bulldozer operator, to grade a road in what she believed was the 100-foot corridor of the easement on Parcel 11 that benefited her property.

Plaintiffs observed the bulldozing taking place on April 4, 2004. The area that had been bulldozed included the land along the secluded pond on plaintiffs' property. Cook saw many changes to their land due to the bulldozing: the pond's dam was graded, the rock spillway and waterfall were buried, and earth had been dumped in the wetlands area. Plaintiffs contacted Lawrence to object to her damaging their property and bulldozing a road in a location that did not correspond to their understanding of the easement.

Michael Dolan is a licensed land surveyor employed in the County of Santa Clara's planning office. Sometime in 2007 he reviewed a grading application submitted by an engineer, Terence Szewczyk, for "an access road for agricultural purposes to access Ms. Lawrence's property." Plaintiffs objected to the grading application on the ground that Lawrence's proposed access road did not correspond with the easement on Parcel 11.

Dolan reviewed the recorded easement and found that it was very difficult to determine the location of the easement because of the way the easement was written. He then had a meeting with Pocan regarding the intended location of the easement. Dolan informed Lawrence that the location of her proposed access road was not in the intended easement. Dolan was not aware that some bulldozing had already taken place on plaintiffs' property.

Expert Testimony

Earl Cross, a licensed land surveyor, testified as an expert in land surveying and easements on plaintiffs' behalf. Cross stated that since 1987 the only person qualified to prepare a legal description of an easement in California is a licensed land surveyor or a pre-1982 civil engineer.

Cross was familiar with the area where plaintiffs' property is located because he and his family have owned property adjacent to Lawrence's property since 1949. He reviewed the legal description and plat map included in the recorded easement and concluded that the legal description placed the easement "on the west side of the ridge" and it was "almost impossible to associate [the plat map] with the written description because of the lack of detail on the plat itself." In addition, it was Cross's opinion that the recorded easement did not meet the standard of care for a licensed land surveyor in 1991.

David Alvarez is a licensed land surveyor who was employed by Lawrence in 2005 to survey Parcels 11 and 5 and to locate the recorded easement. He testified as an expert on behalf of Pocan. In Alvarez's opinion, the description in the recorded easement specified that "this easement had to be left of the first ridge off of San Antonio Road and west of the pond, and within a corridor that was a hundred foot wide. That location of the corridor was not specified." Alvarez also stated that the 100-foot corridor "has to be west of the reservoir." He further determined that the language in the description of the recorded easement conflicted with the Exhibit C plat map attached to it. Based on the description, Alvarez placed the easement adjacent to plaintiffs' secluded pond.

Szewczyk is a civil engineer who testified as an expert on Pocan's behalf regarding the location of the recorded easement on Parcel 11. He found the description in the recorded easement to be "ambiguous as to exactly how high those ridgelines are and how those are defined." However, he believed that the road plan he had prepared for

Lawrence on Parcel 11 was within the 100-foot corridor of the recorded easement except for a variation around pine trees.

Statement of Decision (Liability)

The trial court filed a proposed statement of decision on phase one liability issues in April 2011 to which Pocan filed objections. In March 2012 the trial court filed its statement of decision on liability issues, in which the court made the following findings: (1) "Defendant Jerry Pocan breached the contract he made with the plaintiffs to accurately describe the location of the easement in question;" (2) "The Ninth Cause of Action for breach of contract is not barred by the statute of limitations;" (3) "Defendant Jerry Pocan made a negligent misrepresentation when he promised to prepare a clear, accurate description for the new easement that he and [plaintiff] Cook agreed upon in the field meeting;" and (4) "The plaintiffs' claim for negligence and negligent misrepresentation is not barred by the statute of limitations, Code of Civil Procedure § 338."

2. Damages Phase

Trial Issues

The trial court determined that "plaintiffs' damages are limited to the following: [¶] A. Breach of contract; [¶] B. Negligent misrepresentation; [¶] C. The tort damages may be offset by the settlements with Terri Lawrence and Robert Balcom."

Bulldozer Activities

Balcom is a self-employed heavy equipment operator. Prior to April 2004 he met with Lawrence on her property regarding "clearing the brush for a survey access for the easement." He did not have permits for clearing a road through Lawrence's property or plaintiffs' property because he was just going to clear brush and make a roadway that would allow passage of a survey vehicle.

Balcom began work on April 4, 2014. He chose a path from Lawrence's property onto Parcel 11 based on the plat map attached to the recorded easement. The path of his

bulldozer on Parcel 11 included driving on the manmade dam for the stock pond, which he believed was adjacent to the easement. Balcom drove his bulldozer back and forth on top of the dam numerous times to remove a dead pine tree that was blocking the pond's spillway. He also groomed the top of the dam and piled some dirt in the spillway area that he intended to clear out a few days later.

After Balcom buried the existing spillway, he dug a new earthen trench to serve as a temporary spillway. Sometime later, Balcom installed a culvert and did other work in the dam area. He used the bulldozer rippers to break up a rock formation and water cascade. It would not be possible to restore them to original condition. After subsequent remediation efforts by Balcom, the rock formation and spillway do not look the same as they did before his bulldozer work. The trial court accepted an offer of proof that Lawrence did not give Balcom permission to go on the dam and grade the area near the secluded pond.

Damages Evidence

Plaintiffs obtained a quote of $6,900 for each 25 feet of trees that would be planted to create a privacy screen between the pond and a potential new road from Cannistraci's uncle, Lindell Bennett, who owns a tree business. The total cost for the tree screen would be about $28,000.

Cannistraci consulted Cross Land Surveying, Inc. (Cross Land) after Lawrence and Balcom graded the road on Parcel 11. She paid Cross Land $3,700 for work in 2005 and an additional $920 for prelitigation meetings with herself and Lawrence in 2005 and 2006. Cross Land's invoice, which was admitted over Pocan's objection, showed a charge of $920 for 11.5 hours for attending various meetings and reviewing documents and maps.

Cannistraci believes that the value of plaintiffs' property has been diminished in the amount of $50,000 due to the easements burdening their land and the loss of a year-round stock pond and the natural rock cropping that led to the waterfall cascade.

Szewczyk was hired by Lawrence to do the engineering work required for a road connecting Parcels 5 and 6 with Parcel 11 pursuant to the settlement agreement with Lawrence. He estimated the cost of making a pond similar to plaintiffs' stock pond hold water year-round was about $15,000. In his opinion, it is probable that Balcom's bulldozer grading caused plaintiffs' stock pond to become seasonal. Assuming that Balcom damaged the stock pond by adding dirt and/or changing the dam's spillway, the cost to fix it would be $2,500. Also, if Balcom's bulldozing caused dirt to be lodged in sensitive wetlands, the cost to fix that would be $2,500 if no permit was required and $40,000 if a permit is required. Another cost of repair would be the erosion control needed due to Balcom's bulldozing, which would cost $2,000.

Statement of Decision (Damages)* and *Judgment

The trial court filed a tentative statement of decision on phase two damages issues in June 2013, to which both parties objected. An amended statement of decision on damages issues was filed in December 2013. A judgment in plaintiffs' favor in the amount of $46,320 was filed on December 6, 2013.

Pocan filed a motion to vacate the December 6, 2013 judgment on the ground that he was entitled to a settlement credit pursuant to Code of Civil Procedure section 877[2] in the amount of $50,000 for plaintiffs' settlement with Balcom. Pocan also argued that the Balcom settlement included the amount awarded for privacy tree screening. In addition, Pocan moved to vacate the judgment on the grounds that the damages awarded were excessive, there was insufficient evidence to support the decision, and the decision was not supported by the law.

The trial court filed its final second amended statement of decision regarding damages on February 20, 2014. The court awarded contract damages in the amount of

[2] All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

$920, based on Cross Land's invoice for various meetings with Cannistraci, Cross, and Lawrence to resolve the easement description and location issues. As to tort damages for negligent misrepresentation, the court made several findings.

First, the trial court determined that plaintiffs were entitled to the following property damages: (1) $53,000 for repair of the secluded stock pond; (2) $60,000 for damages to the wetlands; (3) $3,000 for erosion control; and (4) $45,400 for tree screening of the new road around the stock pond and tree irrigation.

Second, the court "concluded that Mr. Balcom's 'recreational and gratuitous grading' of the stock pond dam was so unforeseeable and unexpected as to be an intervening cause. [Citation.] As a result, Mr. Pocan is not responsible for damage to the stock pond, the wetlands, or costs of erosion control." (Fn. omitted.)

Third, the court determined that plaintiffs' tort damages were offset by the earlier settlements pursuant to section 877. The trial court therefore filed an amended judgment in plaintiffs' favor in the amount of the contract damages, $920, plus costs, on February 21, 2014. Pocan filed a timely notice of appeal from the amended judgment.

III. DISCUSSION

On appeal, Pocan challenges the trial court's rulings with respect to liability and damages for negligent misrepresentation and breach of contract. We will begin our evaluation with the applicable standard of review.

A. *Standard of Review*

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. The general rule is that "[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Accordingly, " 'in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be

drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]' [Citation.]" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765 (*Cuielette*).)

The substantial evidence standard of review applies to both the express and implied findings of fact made by the trial court in its statement of decision following a bench trial. *(SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) "The doctrine of implied findings is based on our Supreme Court's statutory construction of section 634 and provides that a 'party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. . . . [I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient . . . and hence the appellate court will imply findings to support the judgment.' [Citation.]" (*Ibid*.)

B. *Negligent Misrepresentation*

Pocan contends that the trial court erred in awarding tort damages for negligent misrepresentation because (1) the cause of action for negligent misrepresentation is barred by the two-year limitations period provided by section 339, subdivision (1), which was not extended by the delayed discovery rule; and (2) he is not liable for the damages awarded for tree screening because he was not the proximate cause of plaintiffs' loss of privacy and because Lawrence is responsible for the cost of tree screening pursuant to her settlement with plaintiffs.

Plaintiffs respond that the cause of action for negligent misrepresentation is not barred by the two-year limitations period provided by section 339, subdivision (1) because Pocan did not plead section 339, subdivision (1) in his answer. Plaintiffs also argue that substantial evidence supports the trial court's finding that the delayed discovery rule applies because plaintiffs were not damaged until 2004. Alternatively, plaintiffs argue that Pocan has not demonstrated prejudice from the trial court's rulings because the award of tort damages was reduced to zero in the amended judgment.

We agree with plaintiffs that Pocan cannot demonstrate prejudice with respect to his claims of trial court error. Our Supreme Court has instructed that " '[n]o form of civil trial error justifies reversal and retrial, with its attendant expense and possible loss of witnesses, where in light of the entire record, there was no actual prejudice to the appealing party.' [Citation.] Accordingly, errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record.' [Citations.] The [*People v. Watson* (1956) 46 Cal.2d 818] standard is essentially congruent with the longtime statutory standard for reversal set forth in Code of Civil Procedure section 475, which provides in pertinent part that '[n]o judgment . . . shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect *was prejudicial,* and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, *and that a different result would have been probable* if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.' (Italics added.)" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802 (*Cassim*).)

Accordingly, we will determine whether it is reasonably probable Pocan would have achieved a more favorable result in the absence of the claimed trial court errors with respect to the trial court's statute of limitations ruling and damages calculation for

negligent misrepresentation. (See *Cassim, supra*, 33 Cal.4th at p. 802.) Our review of the record shows that although the trial court found that plaintiffs were entitled to tort damages because Pocan was liable for negligent misrepresentation regarding the easement on Parcel 11, the court further determined that tort damages were entirely offset by plaintiffs' $50,000 settlement with Balcom.

"By statute, an award in favor of a nonsettling defendant is offset by the amount the plaintiff has received from the settling defendants. (§ 877, subd. (a).) If the settlement amount is greater than the damage award, the award is entirely offset, resulting in a zero judgment. [Citation.]" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330.) Here, since the trial court determined that amount of the Balcom settlement was greater than the tort damages to which plaintiffs were entitled, the result was a zero award for tort damages. (See *ibid*.)

Since no tort damages were awarded, Pocan cannot show that he would have achieved a more favorable result absent the claimed trial court errors with respect to the statute of limitations ruling and the damages calculation for negligent misrepresentation. (See *Cassim*, *supra*, 33 Cal.4th at pp. 801-802.) We therefore determine that Pocan cannot demonstrate that he was prejudiced by the claimed trial court errors. Absent a showing of prejudice, there is no reversible error. (See § 475; *Cassim*, *supra*, at pp. 801-802.)

We are not convinced by Pocan's argument that he is nevertheless prejudiced by the claimed trial court errors regarding negligent misrepresentation. According to Pocan, he will be prejudiced if the judgment is affirmed because the trial court could find that he is not the prevailing party pursuant to the attorney's fees clause in the parties' purchase agreement for Parcel 11. The issue of attorney's fees is not before us in the present appeal and we decline to express an advisory opinion on the issue, since " '[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.' [Citation.]" (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860.)

C. *Breach of Contract*

Pocan contends that the trial court erred in awarding contract damages because (1) the cause of action for breach of contract is barred by the two-year limitations period provided by section 339 for an oral agreement, which was not extended by the delayed discovery rule; (2) plaintiffs' claims are barred by the 10-year statute of repose that applies to surveying acts; (3) no contract damages should have been awarded because the Cross Land invoice for $920 was inadmissible and constitutes improper block billing; and (4) the contract damages are offset by plaintiffs' settlements with Lawrence and Balcom. We will address each issue in turn.

1. Statute of Limitations

In its statement of decision regarding liability, the trial court ruled that the written purchase agreement for Parcel 11 was modified on June 7, 1991, by oral agreement of Pocan and Cook during their meeting on the property. The oral agreement "allow[ed] for a modification of the existing sales contract and a new easement crossing Parcel 11 providing ingress and egress to Parcel 6. That easement was to be to the far west side of the plaintiffs' property and not to impinge on the wetlands and pond area, as that was the exact area that Cook was absolutely unwilling to allow a road to cross. Mr. Pocan's consideration for the new easement was his promise to accurately describe and have recorded the new easement."

The trial court further found that the oral modification of the written purchase agreement "was fully executed and in compliance with Civil Code § 1698(c).[3] . . . [¶] Under those facts, the four-year statute of limitations provided for in Code of Civil

[3] Civil Code section 1698, subdivision (c) provides: "Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions." Subdivision (b) of Civil Code section 1698 provides: "A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties."

Procedure § 337(1)[4] controls." In addition, the court found that under the delayed discovery rule the four-year limitations period did not begin to run until April 2004, when Lawrence bulldozed a road through Parcel 11 "in exactly the location the plaintiffs had insisted no easement could exist." Since the complaint was filed in March 2007 within the four-year limitations period, the trial court concluded that the breach of contract claim was not time-barred.

Pocan contends that the trial court erred in rejecting his statute of limitations defense because two-year limitations period provided by section 339, subdivision (1)[5] for an oral agreement applies to the parties' oral agreement for an easement on Parcel 11 that Pocan would prepare.[6] Plaintiffs disagree, arguing that Pocan's failure to specifically plead in his answer that the breach of contract cause of action was barred by the two-year limitations period of section 339, subdivision (1) constitutes a waiver of that affirmative defense, pursuant to section 458.[7] Pocan replies that plaintiffs are estopped from arguing on appeal that his failure to plead section 339, subdivision (1) constitutes a waiver, since they acquiesced to trial of the issue of the applicability of section 339, subdivision (1).

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[4] Section 337, subdivision (1) provides in part: "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a [obligation of public corporation] of this code; . . . ."

[5] Section 339, subdivision (1) provides in part: "Within two years: [¶] 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; . . . ."

[6] We observe that Pocan states in his verified answer that he "admits that there is a written agreement concerning the easement." However, Pocan's admission has not been addressed by the parties on appeal.

[7] Section 458 provides: "In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."

We need not address the issue of whether Pocan's failure to expressly plead section 339, subdivision (1) as an affirmative defense constitutes a waiver, because we resolve the statute of limitations issue on the merits under the applicable standard of review.

"Resolution of the statute of limitations issue is normally a question of fact. [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810 (*Fox*).) Thus, "[w]hen a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact." (*Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921.) The delayed discovery rule may apply to a contract action. (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 827.) "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause." (*Fox*, *supra*, at p. 803.)

In this case, the trial court found that the evidence showed that the limitations period accrued in April 2004 when plaintiffs discovered that a bulldozer was grading their property and that Lawrence had "purchased Parcels 5 and 6 from Doyle Slack and then concluded that she had a right to bulldoze a road through the plaintiffs' property in exactly the location the plaintiffs had insisted no easement could exist." The trial court further found that plaintiffs had no reason to believe that Pocan had not performed on his promise to prepare and record an easement that accurately reflected the parties' agreement at any time before April 2004. Specifically, the court found that Cook's interactions with Slack in 1992 regarding Slack's intention to build a road across Parcel 11 caused plaintiffs to reasonably "believe that their understanding of the easement's location was accurate and did not serve to start the statute of limitations running." The court also found that after Cook told Slack to check with Pocan regarding the actual location of the easement, Slack dropped his plans to build a road on Parcel 11.

Having considered the evidence in the light most favorable to plaintiffs (*Cuiellette*, *supra*, 194 Cal.App.4th at p. 765), we determine that the trial court's findings are supported by substantial evidence that plaintiffs had no reason to suspect that the recorded easement prepared by Pocan did not accurately reflect their agreement as to the location of the easement on Parcel 11 until April 2004, when their neighbor Lawrence had a road bulldozed on Parcel 11 in a location not consistent with plaintiffs' agreement. Therefore, the trial court did not err in concluding that the breach of contract cause of action accrued in April 2004 under the delayed discovery rule. (See *Fox*, *supra*, 35 Cal.4th at p. 803.)

We next consider whether the trial court erred in determining that the applicable statute of limitations for the breach of contract claim is section 337, subdivision (1), which provides a four-year limitations period for breach of a written contract. The trial court found that "[t]he evidence establishes that a written contract of sale for Parcel 11 was entered into when the plaintiffs signed the counter offer on May 25, 1991. [Citation.] That counter offer did not include the easement which is the subject of this litigation. [¶] Thereafter, Thomas Cook and Mr. Pocan made an oral modification to the written contract of sale, which was fully executed and in compliance with Civil Code § 1698(c). [Citation.] [¶] Under those facts, the four-year statute of limitations provided for in [section] 337[, subd.] (1) controls."

Our analysis is governed by the rules applicable to oral modifications of a written contract. Civil Code section 1698, subdivision (b) provides: "A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties." (See *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944, fn. 4 [construing current version of Civil Code section 1698, subd. (b)].)

Civil Code section 1698, subdivision (c) further provides: "Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement

supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions."

Thus, "[a]n executed oral modification of a term or provision of the contract does not wholly extinguish the contract; the effect is to alter only those portions of the written contract directly affected by the oral agreement leaving the remaining portions intact. [Citation.] 'An "alteration" is a modification or change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed.' [Citation.]" (*Eluschuk v. Chemical Engineers Termite Control, Inc.* (1966) 246 Cal.App.2d 463, 469 (*Eluschuk*).)

Whether a written agreement has been modified by an executed oral agreement is a question of fact. (*Eluschuk, supra,* 246 Cal.App.2d at p. 469.) We therefore review the trial court's finding of an oral modification of a written agreement under the substantial evidence standard of review. (*Grove v. Grove Valve & Regulator Co.* (1970) 4 Cal.App.3d 299, 313.)

Here, the evidence showed that after plaintiffs signed the purchase agreement for Parcel 11 on May 25, 1991, Cook met with Pocan at the property on June 7, 1991. During the June 7, 1991 meeting, Pocan requested an easement across Parcel 11 that would allow access to Parcel 6, and Cook orally agreed to an easement on Parcel 11 that did not go by the secluded pond on Parcel 11. In exchange for Cook's agreement, Pocan orally agreed to prepare an easement document that correctly described the agreed-upon easement on Parcel 11. Plaintiffs signed the first easement document on June 21, 1991. They also signed a second easement document, which was the easement document recorded on June 28, 1991, pursuant to the written purchase agreement for Parcel 11.

Accordingly, we determine that substantial evidence supports the trial court's findings that there was an oral modification of the written purchase agreement for Parcel 11 consisting of the parties' agreement to the subject easement. Substantial evidence also supports the trial court's finding that the oral modification was executed

when the easements were signed, and the oral modification was supported by consideration, which was Pocan's agreement to prepare the easement document. (See Civ. Code, § 1698, subds. (b), (c).)

Since the parties' oral agreement modified the written purchase agreement, the oral modification did not replace the written purchase agreement for Parcel 11. (See *Eluschuk*, *supra*, 246 Cal.App.2d at p. 469.) For that reason, we agree with the trial court that the statute of limitations that applies to plaintiffs' breach of contract claim is section 337, subdivision (1), which provides a four-year limitations period for breach of a written contract. Having previously determined that substantial evidence supports the trial court's finding that the breach of contract cause of action accrued in April 2004 under the delayed discovery rule (see *Fox*, *supra*, 35 Cal.4th at p. 803), we also agree with the trial court that the complaint was timely filed in March 2007, well within the four-year limitations period. We therefore find no merit in Pocan's contention that the cause of action for breach of contract is time-barred by the two-year limitations period provided by section 339, subdivision (1) for breach of an oral agreement.

2. Statute of Repose

Pocan contends that the action is time-barred under the 10-year statute of repose provided by section 337.15 for actions arising from the surveying of real property, since plaintiffs have alleged that Pocan was acting in the capacity of a land surveyor.

Section 337.15, subdivision (a) provides: "No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following: [¶] (1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property. [¶] (2) Injury to property, real or personal, arising out of

any such latent deficiency." " '[T]he purpose of section 337.15 is to protect contractors and other professionals and tradespeople in the construction industry from perpetual exposure to liability for their work. [Citations.]' " (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 374.)

Plaintiffs argue that Pocan waived this affirmative defense by not pleading section 337.15 in his answer and, in any event, section 337.15 does not apply in this case since it involves an easement, not construction of an improvement to real property. Pocan responds that section 337.15 is a statute of repose that is jurisdictional and cannot be waived. In making this argument, Pocan relies on decisions holding that section 337.15 is a statute of repose that cannot be tolled (*Inco Development Corp. v. Superior Court* (2005) 131 Cal.App.4th 1014, 1017) and may apply to continuing nuisance and continuing trespass causes of action (*Chevron U.S.A. Inc. v. Superior Court* (1994) 44 Cal.App.4th 1009, 1018.)

Pocan also relies on a federal court decision, *Donell v. Keppers* (S.D. Cal. 2011) 835 F.Supp.2d 871, for the proposition that section 337.15 is a statute of repose and as such cannot be waived even where the statute is not raised as an affirmative defense below. However, "[s]uch is not the rule in this state, where [statutes of limitation] are regarded as statutes of repose, carrying with them, not a right protected under the rule of public policy, but a mere personal right for the benefit of the individual, which may be waived. [Citations.]" *Tebbets v. Fidelity and Casualty Co.* (1909) 155 Cal. 137, 139.) In other words, "[i]n civil actions, the statute of limitations is a personal privilege and must be affirmatively asserted or it is deemed waived. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 940, fn.4.)

Our review of the record shows that Pocan did not raise a statute of limitations defense based on section 337.15 during the proceedings below. He therefore argues for the first time on appeal that this action is time-barred under section 337.15. "Appellate courts generally will not consider matters presented for the first time on appeal.

[Citations.]" (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) An argument raised for the first time on appeal is generally deemed forfeited. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.) Moreover, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. [Citation.]" (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.)

For these reasons, we determine that Pocan's section 337.15 statute of limitations defense has been forfeited.[8] (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1232; see also *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745.)

3. Evidentiary Error

Pocan contends that contract damages should not have been awarded because the Cross Land invoice for $920 on which the award was based was inadmissible and constitutes improper block billing.

In the second amended statement of decision re damages, the trial court ruled as follows regarding the calculation of contract damages: "The only evidence presented as to actual out-of-pocket costs to rectify the easement description was Exhibit 136, an invoice from Cross Land Surveying, Inc. dated February 1, 2011. The invoice has three entries, two of which are litigation related. However, the first entry for 11.5 hours refers to various meetings with Sharonrose Cannistraci, Earl Cross and Terri Lawrence which, according to the testimony, were efforts to resolve the easement description and location

[8] Our Supreme Court has instructed that "the correct term is 'forfeiture' rather than 'waiver,' because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. [Citations.] As a practical matter, the two terms on occasion have been used interchangeably. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 881, fn. 1.)

issues. The Court will therefore award the sum of $920 (11.5 hours x $80 per hour=$920) as breach of contract damages."

We will resolve Pocan's claim of evidentiary error under the applicable standard of review, as set forth in this court's decision in *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229: "We review a trial court's evidentiary rulings for abuse of discretion. [Citation.] This is particularly so with respect to rulings that turn on the relevance of the proferred evidence. [Citation.] . . . Discretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. [Citation.] A trial court will abuse its discretion by action that is arbitrary or ' "that transgresses the confines of the applicable principles of law." ' [Citations.] In appeals challenging discretionary trial court rulings, it is the appellant's burden to establish an abuse of discretion." (*Id*. at p. 281.)

More specifically, the California Supreme Court has stated the rules governing the admissibility of invoices. "Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. [Citations.] If, however, a party testifies that he [or she] incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his [or her] testimony [citations], and if the charges were paid, the testimony and documents are evidence that the charges were reasonable. [Citations.]" (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43 (*Pacific Gas*).)

The same rules apply to an invoice for professional services. (See, e.g., *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267 [expert witness fees]; *McAllister v. George* (1977) 73 Cal.App.3d 258, 263 [dental bills].) Thus, where there is testimony

that an invoice has been paid, the trial court does not err in admitting the invoice into evidence. (*Pacific Gas*, *supra*, 69 Cal.2d at p. 43.)

In the present case, Cannistraci testified that she paid Cross Land the amount of $920 for 11.5 hours of prelitigation meetings with herself, Cross, and Lawrence regarding the location of the easement and reviewing documents and maps. She also testified that that the amount of $920 for 11.5 hours of surveying services was shown on Cross Land's invoice. Thus, the Cross Land invoice was admissible to corroborate Cannistraci's testimony that she paid Cross Land $920 for prelitigation services regarding the location of the easement on Parcel 11. (See *Pacific Gas*, *supra*, 69 Cal.2d at pp. 42-43.)

Pocan also contends that the Cross Land invoice was inadmissible on the ground that the invoice constitutes improper block billing. He relies on the decision in *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, in which the appellate court ruled that an attorney's "blocked-billing entries render it virtually impossible to break down hours on a task-by-task basis between those related to the Brown Act violation and those that are not [permitted]." (*Id*. at p. 689.)

In the attorney's fees context, it has been held that "[t]rial courts retain discretion to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not. [Citations.]" (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010-1011.) Assuming, without deciding, that this rule would also apply to a bill for surveying services, we find no abuse of discretion in the present case. The trial court clearly discerned, as stated in its ruling, that the charge of $920 in the Cross Land invoice was for prelitigation surveying services regarding the location of the subject easement.

We therefore determine that the trial court did not abuse its discretion in admitting the Cross Land invoice into evidence.

4. Settlement Offset

Finally, Pocan contends that the contract damages in the amount of $920 should be offset by plaintiffs' settlement with Balcom. Plaintiffs respond that no offset was required because Balcom was not obligated on the same contract as Pocan. We agree.

The rules governing offsets for settlement amounts are set forth in sections 877 and 877.6. Section 877 provides in part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

Section 877.6, subdivision (a)(1) provides in part: "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors."

Under section 877.6, "the parties must be co-obligors on 'a' single contract. In other words, they must share the *same* contractual obligation. . . . [T]he plain meaning of the statute is that its benefits apply to codefendants who are liable on the *same* contract." (*Tiffin Motorhomes, Inc. v. Superior Court* (2011) 202 Cal.App.4th 24, 29 (*Tiffin*).) In short, " '[n]othing in the good faith settlement statutes suggests they apply to litigants other than "joint tortfeasors" . . . or "co-obligors on a contract debt." ' " (*Ibid*.)

Here, it is obvious that Balcom was not liable to plaintiffs on the same contract as Pocan, since there was no evidence that Balcom had any contractual relationship with plaintiffs. Balcom is therefore not a co-obligor with Pocan on a contract debt. Under

sections 877 and 877.6, the amount of Balcom's settlement with plaintiffs may not be applied to offset the contract damages of $920 awarded against Pocan. (See *Tiffin*, *supra*, 202 Cal.App.4th at p. 29.)

IV. DISPOSITION

The amended judgment of February 21, 2014, is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.